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**BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON**

**JILL & BRUCE REED and ALICE
NEWLIN,**

Appellants,

v.

**ISLAND COUNTY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,**

Respondents.

SHB NO. 93-41

**SUMMARY JUDGMENT
AND ORDER OF REMAND**

This matter is the fourth request for review arising from the Reed and Newlin property in Island County. Reed and Newlin v. Ecology, SHB No. 87-34, reversed by unpublished opinion of the court of Appeals (215 foot bulkhead); Wells and Dawson v. Island County and Ecology, SHB No. 90-10 (driveway to serve existing residences) and Reed and Newlin v. Island County and Ecology, SHB No. 91-71 (civil penalty for construction of a fence) have preceded this action. This matter concerns an application by Reed and Newlin for a shoreline conditional use permit to retain the fence.

1. On July 23, 1993, appellants, Reed and Newlin, filed their Pretrial Motion for Remand to Island County Board of Commissioners.
2. On August 27, 1993, respondent Island County filed its Response thereto.
3. On September 7, 1993, appellants filed their Reply to Island County's Response.

**SUMMARY JUDGMENT AND
ORDER OF REMAND
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2 4. On September 8, 1993, appellants filed a letter dated September 7, 1993, referring
3 to the Island County Shoreline Master Program.

4 5. On September 13, 1993, respondents filed a letter dated September 9, 1993, also
5 referring to the Island County Shoreline Master Program.

6
7 Having considered the above together with the records and file herein, and being fully
8 advised, the following conclusions are entered:

9 1. There are no genuine issues of material fact, and the moving party is entitled to
10 judgment as a matter of law.

11 2. The appellants are aggrieved by the February, 1993, determination of the Island
12 County Hearing Examiner conditionally granting a shoreline conditional use permit for the
13 fence.

14 3. The appellants have elected to appeal to the Island County Board of Commissioners
15 from the Hearing Examiner's decision.

16 4 The Island county Board of Commissioners have declined to hear appellants'
17 appeal.

18 5. The permit as ordered by the Hearing Examiner and approved by Ecology was filed
19 and is now before us on this appeal and motion.

20 6. The order of the Hearing Examiner provides:

21 *Appeal Process: The decision of the Hearing Examiner in this matter shall be*
22 *final and conclusive unless an appeal is taken to the Board of Island County*
23 *Commissioners within fifteen (15) calendar days following this decision, in*
24 *accordance with the appeal procedures set forth in ICC 16.19.160(a); or is*
25 *appealed in accordance with RCW 90.58.180 (Shorelines Hearings Board*
26 *Appeals). ICC 16.13.100(a)(2), ICC 16.20A.150(b) and/or (c); ICC*
27 *16 19.160(a)*

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2 This language accurately states the meaning of the "Shoreline Management" chapter of the
3 Island County Code, chapter 16.20A and related ordinances. See also ICC 16.21.135(c).

4 7. The meaning of the foregoing Shoreline Management ordinances is that where, as
5 here, an appellant elects to appeal to the Island County Board of Commissioners, an appeal
6 exists, of right.

7 8. Our review of shoreline permits under RCW 90.58.180 allows, in appropriate
8 cases, the remedy of remand. Our remand today stems from that authority and not from the
9 Writ of Mandate statute, chapter 7.16 RCW as urged by respondent. We have previously
10 ordered remand to correct procedural irregularities before proceeding to a review of the
11 merits. Ecology v. Bellingham, SHB No. 89-2 (SEPA compliance), Welchko v. Anacortes,
12 SHB No. 79-45 (master program did not address the site).

13 9. Respondent urges that its "Shoreline Management" ordinance is not a part of its
14 shoreline master program. Under RCW 90.58.140(3);

15 *The local government shall establish a program, consistent with*
16 *rules adopted by the department [of ecology], for the*
17 *administration and enforcement of the permit system provided in*
18 *this section. The administration of the system so established shall*
be performed exclusively by the local government.

19 Island County has provided at the option of the appellant, a right of appeal to its Board of
20 Commissioners, ICC 16.20A.150(b). This includes shoreline conditional use permits appeals
21 ICC 16.20A.010. Nothing in RCW 90.58.140(3) divests these rules of meaning because they
22 are not in the shoreline master program. Rather, RCW 90.58.140(3) requires a shoreline
23 permit program. Island County has adopted one and now must adhere to it, at appellants
24 request, as part of its administration of the adopted permit system.

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2 10. Respondent, Island County, urges that the appearance of fairness doctrine prevents
3 the exercise of review by the Board of Commissioners. The basis of this is the pendency of
4 negotiations for the County's purchase of the Reed and Newlin site as well as pending
5 litigation for money damages between these parties.

6 11. The appearance of fairness doctrine has been set forth as follows:

7 *The question to be asked is this: Would a disinterested person,*
8 *having been apprised of the totality of a Board member's*
9 *personal interest in a matter being acted upon be reasonably*
10 *justified in thinking that partiality may exist. If answered in the*
11 *affirmative, such deliberations, and any course of conduct*
12 *reached thereon, should be voided.*

13 Swift v Island County, 87 Wn.2d 348, 361, 552 P.2d 175
14 (1976). (Emphasis added.)

15 12. No member of the Board of Commissioners is alleged to have a personal interest
16 in the case implying partiality. Rather, the entire Board of Commissioners bears certain
17 responsibility as a result of holding office, and no more. It is doubtful that the appearance of
18 fairness doctrine applies here. Assuming for the sake of argument that the doctrine could
19 apply, nevertheless it does not. This is because of RCW 42.36.090, known as the "rule of
20 necessity":

21 *In the event of a challenge to a member or members of a*
22 *decision making body which would cause a lack of a quorum or*
23 *would result in a failure to obtain a majority vote as required by*
24 *law, any challenged member(s) shall be permitted to fully*
25 *participate in the proceeding and vote as though the challenge*
26 *had not occurred, if the member or members publicly disclose the*
27 *basis for disqualification prior to rendering a decision. Such*
participation shall not subject the decision to a challenge by
reason of violation of the appearance of fairness doctrine.

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2 13. The disqualification of the entire Board of Commissioners would prevent the
3 consideration of appellants' appeal which, by ICC 16.20A.150(b) and other authority cited
4 above, is required by law. The appearance of fairness doctrine does not apply here due to the
5 operation of RCW 42.36.090.

6 14. The disclosure of the County is complete, and it is now time for the appellants'
7 appeal to be heard by the Board of Commissioners.
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1 WHEREFORE IT IS ORDERED that this matter is remanded to the Island County
2 Board of Commissioners to consider the appeal filed by the appellants from the decision of the
3 Island County Hearing Examiner.
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5 DONE at Lacey, WA, this 28th day of September, 1993.

6
7 William A. Harrison
8 HONORABLE WILLIAM A. HARRISON
9 Administrative Appeals Judge
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11 SHORELINES HEARINGS BOARD

12 Robert V. Jensen
13 ROBERT V. JENSEN, Chairman
14

15 Richard C. Kelley
16 RICHARD C. KELLEY, Member
17

18 Thomas R. Cowan
19 THOMAS R. COWAN, Member
20

21 Richard G. Gidley
22 RICHARD GIDLEY, Member
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